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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD GERSTEIN,

Appellant,

vs.

ROBERT PUGH,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE STATE OF NEW JERSEY *AMICUS CURIAE*

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MOTION TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of New Jersey respectfully moves for leave to file out of time the within brief, *amicus curiae* in this case.

The *amicus* has a special interest in the disposition of the case in that the validity of its procedures before trial

may be affected by the court's determination of the merits. For this reason the *amicus* respectfully requests this Court to grant its motion to file this brief out of time.

Respectfully submitted,

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By: HOWARD E. DRUCKS,
Deputy Attorney General,
Division of Criminal Justice.

Dated: August 13, 1974.

Statement of Interest of the *Amicus Curiae*

The United States Supreme Court has recently heard argument addressed to the constitutional propriety of a Florida criminal procedure permitting the incarceration of a defendant when a prosecuting attorney files an information certifying the existence of probable cause. *Florida Statutes* 904.01. The United States Court of Appeals for the Fifth Circuit has held that such incarceration is unconstitutionally founded, mandating the timely determination of probable cause in a formal preliminary hearing. *Pugh* v. *Rainwater*, 483 F. 2d 778 (5 Cir. 1973). Unlike Florida, New Jersey Court Rules do not permit the predication of pre-trial incarceration on the exclusive authority of the prosecutor's imprimatur. The Supreme Court's determination of the constitutional quality and source of a sanction for such incarceration does raise, however, the issue of the validity of the relevant New Jersey practice thus warranting submission of this *amicus* brief asserting its procedural sufficiency. The *Rules Governing The Courts of the State of New Jersey* establish the following prescriptions governing procedure following arrest:

> "If the complaint charges the defendant with an indictable offense, the court shall inform him of his right to have a hearing as to probable cause and of his right to indictment by the grand jury. . . ." Rule 3:4-2.

and

> "If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, the court shall hear the evidence offered by the State within a rea-

sonable time and the defendant may cross-examine witnesses against him." Rule 3:4-4.

New Jersey Courts, citing to these rules, have held that the issuance of an indictment by a grand jury establishes probable cause, thus obviating the need for a preliminary hearing. *State* v. *Boykin*, 113 N. J. Super. 594 (L. Div. 1971); *United States* v. *Conway*, 415 F. 2d 158 (3 Cir. 1969), *cert. den.* 397 U. S. 994 (1969). The State of New Jersey respectfully submits that this proposition is constitutionally correct.

ARGUMENT

POINT I

The issuance of an indictment by a Grand Jury obviates the constitutional need for a formal judicial determination of probable cause.

The gravamen of the Court of Appeal's objection to the Florida practice was the unseemly "entanglement between the prosecutorial and judicial functions . . ." *Id.* at 787. The reviewing court did state that "[i]ncarceration of an untried defendant for up to a month without any scrutiny by a judicial officer of the basis for this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing." *Id.* at 787. It is respectfully submitted that the *Pugh* court's reference to judicial scrutiny should be accorded a generic signification, *i.e.* any examination judicial in nature, although not necessarily conducted by a judicial officer, is a constitutionally satisfactory mode of determining probable cause. Thus, even within the parameters established by the *Pugh* court, the New Jersey practice is permissible.

It should be noted that in *Ocampo* v. *United States*, 234 U. S. 91 (1914), cited by the *Pugh* court, the Supreme Court, in dictum, observed that a determination of probable cause is not categorically a judicial act:

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally, or under General Orders, No. 58, as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest.
>
> • • •
>
> *"In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."* *Id.* at 100-01 (emphasis provided).

The *Pugh* court correctly noted that *Ocampo* dealt with a pre-arrest probable cause hearing, as distinguished from a post-arrest situation when "the State already has the defendant in custody [and] is not in jeopardy of losing him before a magistrate can rule on probable cause." *Pugh, supra* at 784. The court then held that the prosecuting attorney in that context, irrespective of the dictum in *Ocampo*, was not sufficiently detached to initiate the criminal process through a certification of probable cause.

The State of New Jersey would disagree with the holding of the *Pugh* court to the extent it may be read to man-

date a formal judicial hearing as the exclusive mode for determining probable cause. Although *Ocampo* may not be precedentially binding as to the permissibility of the prosecutor's certification, its language bearing on the quasi-judicial character of the process of determining probable cause is apropos to a constitutional review of the New Jersey practice. As noted above, the *Pugh* court was disturbed by what it deemed an inappropriate arrogation by the prosecutor of a judicial function. Yet, as observed by the *Ocampo* court, the determination of probable cause is not a strictly judicial act. Although the *Pugh* court was concerned with the classic jurisprudential problem of prosecutorial encroachment upon the judicial province, the real focus of the court's attention was the effect upon the integrity of the prosecutorial function by assimilation of what is an essentially non-prosecutorial task. Consequently the *Pugh* court's solicitude for the Supreme Court's pointed references in *McNabb* v. *United States,* 318 U. S. 322 (1942), to "disinterestedness in law enforcement" and in *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1970), to the difficulty encountered by prosecutors and policemen in maintaining neutrality while participating in the "competitive enterprise" of law enforcement is readily understandable. Prosecutorial integrity in substance and appearance is obviously unimpaired when the obligation of determining probable cause is reposed in a non-prosecutorial, albeit not formally judicial, entity.

In *Shadwick* v. *Tampa,* 407 U. S. 345 (1971), for example, the Supreme Court held that clerks of the Municipal Court were competent to issue arrest warrants. The crucial determinants of the constitutionality of this practice were the detachment and neutrality of the issuing officers, to wit, their dissociation from the prosecutorial function:

> "The requisite detachment is present in the case at hand. Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires." *Id.* at 351. Compare *Coolidge* v. *New Hampshire, supra.*

Identical institutional attributes are exhibited by the grand jury. In New Jersey the institution has been traditionally regarded as manifesting a judicial character:

> "The question reduces itself to whether the grand jury is part of the court. Of this it seems there is no doubt. In *In re Schwartz,* 133 N. J. L. 79, 84-85 (Sup. Ct. 1945), reversed on other grounds, 134 N. J. L. 267 (E. & A. 1946), the court of last resort approved the expression of the law 'that the grand jury is an arm of the court, and that contempts in the presence of the grand jury are to be treated as taking place in the presence of the court.'" *State* v. *Haines,* 18 N. J. 550, 557 (1955).

The *Haines* court also cited the following pertinent language from *O'Regan* v. *Schermerhorn,* 25 N. J. Misc. 1, 19-20 (Sup. Ct. 1946): "The grand jury, at common law, is an arm of the court and acts for the court under which it is organized, and its proceedings are regarded as proceedings in the court. * * * Its members are officers of the court and *exercise functions of a judicial nature* and its proceedings are judicial." (emphasis provided). That the

grand jury possesses the requisite qualities of fairness and disinterest to fairly discharge these functions has been recognized by the Supreme Court. *Branzburg* v. *Hayes*, 408 U. S. 665, 688 (1972); *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962); *Costello* v. *United States*, 350 U. S. 359, 362 (1956). Consequently it is not surprising that many federal courts have held that the issuance of an indictment renders a preliminary hearing unnecessary. As noted in *United States* v. *Mackey*, 474 F. 2d 55 (4 Cir. 1973), *cert.* den. 83 S. Ct. 2782 (1973):

> "[Defendants] have failed to advance any arguments which persuade us to reconsider our long-standing rule that the return of an indictment by the grand jury eliminates the requirement of holding a preliminary hearing. The purpose of both is to insure the existence of probable cause before an accused is brought to trial. That purpose is fully effectuated by either." *Id.* at 56.

See also *United States* v. *Anderson*, 481 F. 2d 685, 691 (4 Cir. 1973); *United States* v. *Daras*, 461 F. 2d 1361 (9 Cir. 1972), *cert.* den. 409 U. S. 1046 (1972); *United States* v. *Le Pera*, 443 F. 2d 810 (9 Cir. 1971), *cert.* den. 404 U. S. 958 (1971); *United States* v. *Lewis*, 443 F. 2d 1146 (D. C. Cir. 1970); *Clemons* v. *United States*, 408 F. 2d 1230 (D. C. Cir. 1968), *cert.* den. 394 U. S. 964 (1968); *Woods* v. *State of Texas*, 404 F. 2d 332 (5 Cir. 1968); *Bayless* v. *United States*, 381 F. 2d 67 (9 Cir. 1967); *Rivera* v. *Government of Virgin Islands*, 375 F. 2d 988 (3 Cir. 1967).

It is true that certain District of Columbia Circuit decisions have imputed an indispensible discovery function to the preliminary hearing, to wit:

> "We have recognized that the preliminary hearing is an important right of an accused affording him '(1) an opportunity to establish that there is no probable cause for his continued detention • • • and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.' [citations omitted]. . . . Moreover, we have held that the right to a preliminary hearing, if timely asserted, is not forfeited solely by the later return of an indictment." *Ross* v. *Sirica*, 380 F. 2d 557 (D. C. Cir. 1967).

See also *Holmes* v. *United States*, 370 F. 2d 209 (D. C. Cir. 1966); *Crump* v. *Anderson*, 352 F. 2d 649 (D. C. Cir. 1965); *Blue* v. *United States*, 342 F. 2d 894 (D. C. Cir. 1965), *cert.* den. 380 U. S. 944 (1965).

That a defendant is incidentally benefitted by his exposure to part of the triable State's case at the preliminary hearing is conceded. Yet other courts have held this minimal advantage to be an insufficient basis for the enunciation of a generalized right to such a hearing:

> "'Petitioner relies on the recent decision of the Court of Appeals for District of Columbia Circuit in *Ross* v. *Sirica*, 380 F. 2d 557 (D. C. Cir. 1967).
>
> • • •
>
> We cannot agree to elevating into a right to be enjoyed by an accused the pure fortuity that where a preliminary hearing is held there is necessarily some discovery of the government's evidence. It is quite clear from the logic as well as the history of the procedure that discovery is *not* one of its purposes." *Sciortino* v. *Zampano*, 385 F. 2d 132 (2 Cir. 1967), *cert.* den. 390 U. S. 960 (1968).*

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* New Jersey Rules provide for ample discovery by a defendant of the State's case. See Rule 3:13-3(a) appended to this brief.

See also *United States* v. *Amabile,* 395 F. 2d 47, 53-54 (7 Cir. 1968); *Swingle* v. *United States,* 389 F. 2d 220, 223 (10 Cir. 1968), *cert.* den. 392 U. S. 928 (1968); *Spinelli* v. *United States,* 382 F. 2d 871, 887 (8 Cir. 1967), reversed on other grounds, 383 U. S. 410 (1969); *Bayless* v. *United States, supra; United States* v. *Chase,* 372 F. 2d 453, 467 (4 Cir. 1967), *cert.* den. 387 U. S. 907 (1967); *United States* v. *Smith,* 357 F. 2d 318, 320 (6 Cir. 1966).

In sum, New Jersey, in contradistinction to the practice in Florida, provides a constitutional *quid pro quo* for a formal judicial determination of probable cause. The conceptual task of determining probable cause has been characterized as being only a quasi-judicial function. Consequently the grand jury, an entity partaking of the judicial character, although not composed of formal judicial officers, is a constitutionally appropriate substitute for a formal judicial hearing.

CONCLUSION

For the reasons expressed herein the *amicus* respectfully submits that the issuance of an indictment obviates the constitutional need for a preliminary hearing.

Respectfully submitted,

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APPENDIX

3:13-3. Discovery and Inspection

(a) Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant

(1) books, tangible objects, papers or documents obtained from or belonging to him;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(3) grand jury testimony;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecuting attorney;

(5) reports or records of prior convictions of the defendant;

(6) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the State;

(7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information including a designation by the prosecuting attorney as to which of those persons he may call as witnesses;

(8) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior conviction of such persons;

(9) police reports which are within the possession, custody, or control of the prosecuting attorney;

(10) warrants, which have been completely executed, and the papers accompanying them including the affidavits, transcripts or summary of any oral testimony, return and inventory.